Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket 92-259
	)	
	)	
Broadcast Signal Carriage Issues	)	

COMMENTS OF THE NATIONAL PRIVATE CABLE ASSOCIATION, CABLE PLUS MAXTEL CABLEVISION, PACIFIC CABLEVISION AND STELLARVISION

Introduction and Summary of Argument

The National Private Cable Association ("NPCA"), Cable Plus, MaxTel Cablevision, Pacific Cablevision and Stellarvision, by their attorneys, hereby submit these comments in response to the Notice of Proposed Rulemaking ("Notice") in the above-captioned matter.

NPCA is the principal trade association for the private cable, or satellite master antenna television ("SMATV"), industry whose members provide multichannel video programming services via wired or wireless technology to residents of apartment complexes, condominiums, cooperatives, manufactured housing parks, planned unit developments, hotels, hospitals, nursing homes, educational institutions, and other multi-dwelling facilities. The private cable industry serves approximately 2.983 million subscribers nationwide, see Paul Kagan SMATV News, Oct. 31, 1992 at 3, and typically represents the only multichannel video services competitor to traditional franchised cable operators in their franchise areas. The remaining commenters are individual private

cable operators owning private cable systems throughout the United States and who together serve over 72,000 subscribers. All commenters are collectively referred to hereafter as NPCA.

NPCA's overriding concern is that the Commission properly implement the dictates of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Act") so as to include SMATV within the class of competitors to traditional franchised cable operators that were intended by Congress to receive certain rights and benefits. The plain language of the 1992 Act, as well as its legislative history, commands this result.

With particular respect to Section 6 of the 1992 Act, to be codified at 47 U.S.C. § 325(b), NPCA urges the Commission to adopt rules insuring that all multichannel video programming distributors are treated equally by television broadcast stations electing to exercise their retransmission consent rights. The 1992 Act expressly provides that a broadcaster's election between must-carry and retransmission consent shall apply to all cable systems operating in the same geographic area. The pro-competitive and pro-consumer policies which justify this "single election" policy also dictate that all multichannel video providers, including SMATV operators, have the same opportunity to carry the signal of a broadcaster electing retransmission consent, rather than limiting that opportunity to cable system operators only.

I. CONGRESS CLEARLY INTENDED SMATV OPERATORS TO BE INCLUDED WITHIN THE SCOPE OF THE "MULTICHANNEL VIDEO PROGRAMMING DISTRIBUTOR" DEFINITION

In paragraph 42 of its Notice, the Commission seeks comment on the "scope" of the definition of a "multichannel video programming distributor", and specifically whether such definition should be construed to include SMATV operators. This inquiry is a curious one, since the statutory definition, by its plain language, obviously covers SMATV operators: "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." 1992 Act, § 2(c)(12), to be codified at 47 U.S.C. § 522(12). First, the services expressly included within this definition are illustrative examples only, i.e., the "such as, but not limited to" clause evinces a congressional intent to list services solely for the purpose of illuminating the definitional language, and not to restrict the scope of the definition.

Second, SMATV operators, like the expressly listed services, fall squarely within the definitional language since they "make[] available for purchase, by subscribers or customers, multiple channels of video programming." Id. From the consumer perspective, there is little difference between the programming service offered by a SMATV operator, whether delivered via coaxial

cable or 18 GHz frequencies, and the programming service offered by a traditional cable operator or a MMDS operator. Indeed, SMATV operators typically offer more channels than a MMDS operator whose channel capacity is limited (at least until the widespread deployment of digital compression technology). As recognized in the House Report, cable overbuilds exist in less than 1 percent of the cable markets nationwide. See H. R. Rep. No. 628, 102d Cong., 2d Sess. 45 (1992) ("H. Rep."). DBS service is not yet even a reality. The breadth of the definitional language proves a congressional intent to cover all multichannel distributors of similar video programming services, including both present and future providers and regardless of the technology employed to reach the subscriber's television set. It simply does not stand to reason that Congress would have intended to exclude SMATV operators from this definition when SMATV operators at this juncture serve more subscribers than their MMDS or cable overbuilder counterparts.

"Because the plain language of the statute is unambiguous, resort to legislative history is unnecessary." Definition Of A Cable System, 5 F.C.C. Rcd. 7638, 7641 (1990), vacated on other grounds sub nom. Beach Communications, Inc. v. FCC, 965 F.2d 1103 (D.C. Cir. 1992), cert. granted sub nom. United States v. Beach Communications Inc., 61 U.S.L.W. (U.S. Nov. 30, 1992) (No. 92-603). However, the legislative history directly supports NPCA's conclusion that Congress intended SMATV operators to be encompassed by the definition. Congress repeatedly included SMATV operators within the class of competitors to traditional

cable franchisees that were to receive certain rights and benefits under the 1992 Act. See, e.g., S. Rep. 92, 102d Cong., 1st Sess. 71 (1991) ("S. Rep.") ("The term 'multichannel video programming distributor' means a person who makes available for purchase, by subscribers or customers, multiple channels of video programming. . . . Examples of multichannel video programming distributors include wireless cable and satellite master antenna television.") (emphasis added); H.Rep. at 27 ("A principal goal of H.R. 4850 is to encourage competition from alternative and new technologies, including competing cable system, wireless cable, direct broadcast satellites, and satellite master antenna television services."); at 30 ("The Committee notes that the competition to cable system operators from other providers of video programming that the Committee anticipated during consideration of the 1984 Act, such as wireless and private cable operators, cable overbuilders, the home satellite dish market, and direct broadcast satellite operators, largely has failed to energy [sic]."); at 44 ("The Committee believes that steps must be taken to encourage the further development of robust competition in the video programming marketplace. Such competition may emerge from a number of sources, including wireless and private cable systems, cable overbuilds, and [the] home satellite dish market, and DBS systems, among others.").

Moreover, Congress enacted crossownership restrictions banning a franchised cable operator from owning a stand-alone SMATV system in its franchise area. See 1992 Act, § 11, to be codified at 47 U.S.C. § 533(a)(2). If Congress did not view SMATV operators

as multichannel video programming distributors competing with traditional cable operators, Congress certainly would not have included SMATV operators within such a ban.

In short, there is nothing in the plain language of the provision or the legislative history of the 1992 Act to suggest that Congress meant to differentiate between multichannel distributors or to place any of them on an unequal footing with respect to the retransmission of television broadcast stations, or the application of any of the other relevant provisions of the 1992 Act, e.g., program access (Section 9) or program carriage agreements (Section 12). NPCA strongly maintains that Congress left this Commission with no flexibility to exclude any entities who sell "multiple channels of video programming" from treatment as a "multichannel video programming distributor" under the 1992 Act.

II. THE COMMISSION SHOULD ADOPT RULES PROTECTING CONSUMERS FROM POTENTIAL EXCLUSIVITY PROVISIONS IN RETRANSMISSION CONSENT CONTRACTS AS BETWEEN CABLE FRANCHISEES AND TELEVISION BROADCASTERS

Congress set forth explicit findings concerning the importance of local television broadcast programming to consumers, and thus the corollary need for such programming to be available to competitors of traditional cable franchisees:

> (11) Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.
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> (12) . . . Such [broadcast] programming is otherwise free to those who own television sets and do not require cable transmission to

> receive broadcast signals. There is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming.
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> (17) Consumers who subscribe to cable television often do so to obtain local broadcast signals which they otherwise would not be able to receive, or to obtain improved signals. Most subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, or cannot otherwise receive broadcast television services. . . .
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> (18) Cable television systems often are the single most efficient distribution system for television programming. A government mandate for a substantial societal investment in alternative distribution systems for cable subscribers, such as the "A/B" input selector antenna system, is not an enduring or feasible method of distribution and is not in the public interest.
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> (19) At the same time, broadcast programming that is carried remains the most popular programmming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of the signals of network affiliates, independent television stations, and public television stations. Also cable programming placed on channels adjacent to popular off-the-air signals obtains a larger audience than on other channel positions. Cable systems, therefore, obtain great benefits from local broadcast signals which, until now, they have been able to obtain without the consent of the broadcaster or any copyright liability. . . .

1992 Act, § 2(a).

The 1992 Cable Act requires broadcasters to elect between must carry and retransmission consent with respect to carriage of

their signals by cable system operators. Congress expressly provided that a broadcaster's election shall apply to all cable operators serving the same geographic area. This requirement of uniformity reflects Congress' intent to promote competition among cable systems operating in the same area, by prohibiting a broadcaster from granting retransmission rights to one cable operator while denying them to a competing operator. This pro-competitive policy dictates that the broadcaster's single election should apply to all multichannel video providers in the area, and not just to all cable operators.

Finding numbers 17 and 19 particularly underscore Congress' determination that consumers demand local broadcast programming as an essential component of whatever multichannel video programming service they select. It stands to reason that should any particular multichannel video programming distributor, whether SMATV or wireless or potentially DBS or 28GHz, be denied retransmission rights despite a grant of same to its competitors, especially traditional cable franchisees, that distributor will be severely disadvantaged, perhaps irreparably so, in its ability to compete in the local marketplace. Moreover, Congress has already determined, in finding numbers 17 and 18, that alternative means for consumers to receive such signals, apart from the distribution facilities of the multichannel video programming operator, either do not exist at all, or are not feasible to implement.

Unless the Commission adopts rules to ensure that commercial television broadcasters treat all multichannel video

programming distributors in the same geographic market equally for purposes of withholding or granting retransmission consent, NPCA predicts that cable franchisees will induce and/or coerce such stations to deny signal access to alternative video distributors, such as private and wireless cable operators. Such discriminatory denial is contrary to the public interest, as it advances neither consumer access to what are, after all, free over-the-air signals intended for receipt by the general public, nor local competition to entrenched cable franchisees, a paramount objective of the 1992 Act. See 1992 Act, § 2(b), Statement of Policy 1; see id., § 2(a), Findings 2, 5. Having suffered under anti-competitive program exclusivity regimes covering the retransmission of non-broadcast programming for over a decade, NPCA strongly requests that the Commission not permit similar program exclusivity barriers to be erected with respect to the retransmission of broadcast signals.

Given that the historical trend of the traditional franchised cable industry has been to design anti-competitive exclusive programming rights, NPCA's belief that such predilections will also be followed in the negotiation and execution of retransmission consent contracts is not without precedent. Much of the 1992 Cable Act is aimed at rectifying certain anticompetitive practices engaged in by the cable industry, including provisions directing the Commission to insure nondiscriminatory access to programming services and to regulate program carriage agreements such that exclusivity cannot be "coerced". See, e.g., 1992 Act at §§ 12, 19, amending the Communications Act of 1984 to include §§

616 and 628, respectively. It would be ironic indeed, and clearly contrary to congressional intent, for the Commission to adopt regulations aimed at counterbalancing the "undue market power [of] the cable operator as compared to that of consumers and video programmers" in the non-broadcast programming arena and yet leave such market power unchecked in the broadcast programming arena. See 1992 Act, § 2, finding 2.[1/]

NPCA envisions a regulatory scheme in which the commercial television broadcaster continues to maintain control over the retransmission of its signal, but whose election, once made, governs all multichannel video programming distributors serving subscribers in the same geographic area. Thus, if a commercial television broadcaster does not elect to exercise its rights under the retransmission consent provision, but rather asserts its rights to carriage under Section 614, that decision should automatically grant, without more, a right of carriage to all multichannel video programming distributors. In such event, any alternative distributors choosing to carry the signal would be entitled to do so without the payment of any compensation. Of

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[1/] With respect to broadcast programming, the typical argument advanced by the traditional franchised cable industry in support of program exclusivity, i.e., that the industry's investment in such programming justifies exclusive control over its distribution, disappears. Not only has the franchised cable industry not invested in such programming, it has also vehemently fought against the retransmission consent provision precisely because it involves a compensation scheme for the investment of others. Thus, the only purpose for securing exclusive rights to broadcast programming would be to discourage competition in the multichannel video industry, a result which Congress categorically opposed and which the Commission should unequivocally prohibit.

course, such distributors would continue to be governed by the compulsory copyright licensing provisions of the Copyright Act, according to whatever coverage or noncoverage that Act has been determined to provide.[2/]

In circumstances in which the commercial television broadcaster elects to exercise its retransmission consent rights, NPCA presumes that election is made by the broadcaster in order to authorize carriage by the cable franchisee, and not to deny it. Again, that decision should automatically grant, without more, a signal retransmission right to all multichannel video programming distributors. If monetary compensation has been paid by the cable franchisee to the broadcaster in exchange for retransmission rights, then the amount charged to other video distributors should be no greater than the compensation paid by the cable franchisee, calculated on a per subscriber basis. NPCA does not intend to suggest that commercial television broadcasters must charge alternative video distributors for retransmission services simply because charges have been levied upon the local cable franchisee. The broadcaster's reasoning for obtaining compensation from the cable franchisee, e.g., the increasing reallocation of advertising revenues from the broadcaster to the cable franchisee, may simply be inapplicable to alternative video distributors who do not

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[2/] The Copyright Office has ruled preliminary that SMATV operators are entitled to a compulsory license for the retransmission of television broadcast signals. Cable Compulsory License; Definition of Cable Systems, 56 Fed. Reg. 31,580 (1991) (to be codified at 37 C.F.R. § 201) (proposed June 27, 1991); see id., 57 Fed. Reg. 3284 (1992).

compete for advertising revenues. Rather NPCA merely urges the Commission to adopt rules insuring that an alternative multichannel video programming distributor is entitled to retransmit a commercial television broadcast signal at rates and on terms and conditions no more onerous than those imposed on the cable franchisee retransmitting such signal. If consideration other than monetary compensation has been provided by the cable franchisee, e.g., favorable channel positioning or joint marketing, such consideration should not preclude retransmission of the broadcaster's signal by alternative multichannel video programming distributors even if such consideration cannot be matched by such distributor.

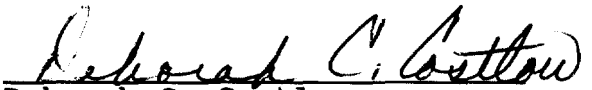
This Commission undoubtedly has the authority to enact rules insuring that a commercial television broadcaster makes a single election with respect to retransmission consent for all multichannel video programming distributors serving subscribers in the same geographic area. Congress did not intend a television broadcaster to negotiate selectively in a given market so as to divide that market into the haves and the have-nots from the perspective of the consumer, or so as to affect the competitive position of one multichannel distributor vis-a-vis another. While the Commission concludes that "each television station will make a single election for each cable system in its market", Notice at para. 45, the Commission seems to have ignored the fact that the same policy justifications mandating that single election as between directly competing cable systems must also command a single

election as between cable systems and their alternative multichannel video distributor counterparts. No reason exists for differentiation; every reason exists for equal or similar treatment.

Conclusion

For the foregoing reasons, NPCA respectfully requests that the Commission adopt rules consistent with the above. Such rules are a critical step in implementing congressional intent that consumers not remain the victims of a noncompetitive cable marketplace.

Respectfully submitted,



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